

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THEIN TONY VU,

Petitioner,

Civ. S-01-1249 DFL CMK P

v.

O R D E R

DERRAL G. ADAMS, Warden, et
al.,

Respondents.

Petitioner applied for a writ of habeas corpus under 28 U.S.C. § 2254, asserting two grounds for relief: (1) on its own initiative, the state trial court should have instructed the jury on lesser included offenses; and (2) the evidence presented at trial was insufficient to support petitioner's conviction for conspiracy to commit murder. The petition was denied on June 28, 2005. Pending before the court is petitioner's request for a certificate of appealability, filed on July 26, 2005.

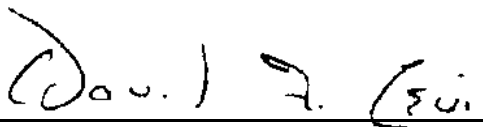
Under 28 U.S.C. § 2253, a certificate of appealability is warranted only if the case presents a "substantial question,"

1 i.e., one that is "'debatable among jurists of reason,'" could be
2 resolved differently by a different court, or is "'adequate to
3 deserve encouragement to proceed further.'" Jennings v.
4 Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot
5 v. Estelle, 463 U.S. 880, 893 (1983)).

6 This case presents a "substantial question" on the issue
7 regarding the lesser-included-offense instruction because of a
8 split in the courts of appeals. Accordingly, petitioner's
9 request for certificate of appealability on this issue is
10 GRANTED. However, the second issue regarding evidence of
11 conspiracy to commit murder does not present such a "substantial
12 question." Therefore, petitioner's motion for certificate of
13 appealability on the second issue is DENIED.

14 IT IS SO ORDERED.

15 Dated: 3/7/2006

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19 DAVID F. LEVI
20 United States District Judge
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